No. 17-269

# In The Supreme Court of the United States

STATE OF WASHINGTON,

*Petitioner,*

v.

UNITED STATES OF AMERICA, ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF RESPONDENT TRIBES IN OPPOSITION


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## QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that Washington lacks license to destroy treaty fisheries through direct, in-stream blockages, where that holding conflicts with no decision of this Court or any other court and is demonstrably faithful to the treaty language and history.

2. Whether the Court of Appeals erred in holding that the federal government may abrogate tribal treaty rights only through express congressional action, rather than through inferences drawn by the State from the putative actions of federal bureaucrats with no responsibility for tribal affairs.

3. Whether the Petition's twice-discredited assertions regarding the cost and scope of the district court's injunction warrant this Court's review.

## PARTIES

Petitioner is the State of Washington, which, together with the Director of the State Department of Fisheries and Wildlife, was defendant at trial, and appellant at the Ninth Circuit.

Respondents are the United States of America, Confederated Tribes and Bands of the Yakama Nation, Hoh Indian Tribe, Jamestown S'Klallam Tribe, Port Gamble S'Klallam Tribe, Lower Elwha Klallam Tribe, Lummi Nation, Makah Tribe, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Nooksack Tribe, Puyallup Tribe, Quileute Indian Tribe, Quinault Indian Nation, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe of Indians, Suquamish Indian Tribe, Swinomish Indian Tribal Community, Tulalip Tribes, and Upper Skagit Indian Tribe. Respondents were the plaintiffs at trial and the appellees at the Ninth Circuit.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | v |
| INTRODUCTION | 1 |
| STATEMENT OF THE CASE | 3 |
| I. FACTUAL BACKGROUND | 3 |
| A. The Stevens Treaties | 3 |
| B. Barrier Culverts and the Decline in Washington's Fisheries | 6 |
| II. COURSE OF PROCEEDINGS | 11 |
| REASONS FOR DENYING THE PETITION | 16 |
| I. THE COURTS BELOW CREATED NO CONFLICT, BUT INSTEAD HEWED CLOSELY TO THE TREATY LANGUAGE AND THIS COURT'S PRECEDENTS, IN HOLDING THAT WASHINGTON DOES NOT HAVE LICENSE TO DESTROY THE TREATY FISHERIES | 16 |
| A. The Court of Appeals' Interpretation of the Stevens Treaties Creates No Conflict in Lower Court Authority | 16 |
| B. The Court of Appeals' Decision Does Not Conflict with *Fishing Vessel* | 17 |

TABLE OF CONTENTS – Continued

Page

C. The Court of Appeals' Decision Conflicts with No Other Decision of This Court ..... 21

D. No Occasion Exists for Revisiting the Careful, Factbound Examination of the Historical Record Conducted by the Courts Below ..... 23

E. The State's Attack on the Court of Appeals' Alternate Holding Suggests No Basis for this Court's Review ..... 24

II. THE COURTS BELOW CREATED NO CONFLICT IN REJECTING THE STATE'S EQUITABLE DEFENSE OF WAIVER..... 26

III. THE STATE'S RECORD-BOUND ATTACKS ON THE DISTRICT COURT'S INJUNCTION REST ON PREMISES THOROUGHLY DISCREDITED BELOW ..... 29

IV. THE STATE'S ATTEMPT TO SOW FEARS ABOUT FUTURE DECISIONS DOES NOT TRANSFORM THE NARROW HOLDING BELOW INTO ONE DESERVING OF REVIEW BY THIS COURT..... 36

CONCLUSION ..... 39

APPENDIX

Letter from Washington Commissioner of Public Lands to Washington Attorney General (Aug. 11, 2017) .....1a

# TABLE OF AUTHORITIES

Page

CASES

*Arizona v. California*, 373 U.S. 546 (1963) ..... 19, 25

*Cappaert v. United States*, 426 U.S. 128 (1976) ..... 25

*Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005) ..... 28

*Choctaw Nation of Indians v. United States*, 318 U.S. 423 (1943) ..... 21

*City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) ..... 27, 28, 29

*Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991) ..... 23

*Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830 (1996) ..... 30

*Glossip v. Gross*, 135 S. Ct. 2726 (2015) ..... 30

*Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) ..... 23, 26

*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) ..... 23

*Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010) ..... 28

*Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165 (1977) ..... 19

*Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163 (2d Cir. 2014) ..... 28

*Tulee v. Washington*, 315 U.S. 681 (1942) ..... 6

*United States v. Dion*, 476 U.S. 734 (1986) ..... 26

TABLE OF AUTHORITIES – Continued

Page

*United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) ..... 11

*United States v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980) ..... 12

*United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985) ..... 12

*United States v. Washington*, 157 F.3d 630 (9th Cir. 1998) ..... 21

*United States v. Winans*, 198 U.S. 371 (1905) .... 4, 6, 22

*Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) ..... *passim*

*Winters v. United States*, 207 U.S. 564 (1908) ..... 24, 25

STATUTES, LAWS, AND TREATIES

Magna Carta of 1215, Ch. 33, 1 Statutes of the Realm 11 (1810), English translation at http://avalon.law.yale.edu/medieval/magframe.asp ..... 6

Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132 ..... 5, 22

Act of August 14, 1848, 9 Stat. 328 ..... 7

Act of March 2, 1853, 10 Stat. 172 ..... 7

Wash. Rev. Code § 77.15.320 (2017) ..... 7

Wash. Rev. Code § 77.57.030 (2017) ..... 7

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Results Washington, Public Dashboard, Goal 3 Measure 2.2.c (Dec. 2015) https://data.results.wa.gov/reports/G3-2-2-c_Fish-Passage-Barriers .....15

Sup. Ct. R. 10 .....30

Sup. Ct. R. 15 .....34

Wash. Att'y Gen. Op. No. 304, Fish Passage Facilities for Highway Culverts (July 19, 1950).....7

## INTRODUCTION

This case concerns the passage of treaty-protected fish. The core facts are largely beyond dispute. For centuries, the culture and economy of the western Washington Tribes depended on salmon, which returned from the Pacific in immense numbers to spawn in local streams. When those Tribes entered into Treaties ceding their homelands to the United States, they insisted upon a permanent right to continue taking the fish that were their lifeblood. Today, those federal treaty rights are threatened. The State maintains hundreds of barrier culverts that prevent salmon from completing their normal migration to and from the ocean. There is no serious question about the culverts' impact. The State's own agencies have documented the resulting devastation to the fisheries, and the district court made detailed findings in this regard. Nor is there any doubt about the State's ability to fix the problem – again, the State's own agencies have demonstrated the feasibility of remediating the culverts to simulate normal stream flow. Nevertheless, the State has resisted repeated calls to respect the Tribes' federal treaty rights, ignoring the Tribes, the State's own commercial fishermen, and even the head of its own Department of Natural Resources, all of whom have urged the State to comply with the law and preserve the fisheries.

Faced with the State's inaction, the Tribes and the United States turned to federal court to vindicate the Tribes' federal rights. The courts below correctly recognized that the right to fish is of little value if the State can bar the streams, and thus properly held the State's

refusal to remediate its fish-destroying culverts to violate the Treaties. The State's arguments notwithstanding, this narrow and straightforward holding broke no new ground. It fully accords with the treaty text and the clear promises made by the United States treaty negotiators – promises previously reviewed and explicated by this Court. The holding conflicts with no appellate decision, and hews faithfully to the seven prior decisions of this Court interpreting the Treaties. And it is consistent with state policy. Since statehood, and in accordance with dictates dating back centuries, Washington has required that in-stream barriers allow for fish passage, and nearly seven decades ago Washington's Attorney General made clear that this requirement applies to road culverts.

To argue for certiorari, therefore, the State has to turn this case into something that it is not. Legally, the State claims that this case disposes of issues ranging from land use to water rights, when truly it is a case about fixing state culverts that obstruct fish passage. Factually, it asks this Court to ignore the district court's detailed, well-supported findings, affirmed by the Court of Appeals, on issues ranging from the historical intent of the treaty negotiators to the present-day harm caused by its culverts. The Petition overstates the scope of the injunction, distorting the district court's careful tailoring beyond recognition, and repeats cost estimates that have been thoroughly discredited. These efforts do not transform the careful,

record-based conclusions drawn below into ones warranting this Court's review.

## STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND

#### A. The Stevens Treaties

From time immemorial, the Indians of western Washington have been a fishing people. "[A]ll of them shared a vital and unifying dependence on anadromous fish," *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664 (1979) ("*Fishing Vessel*"), which "was the great staple of their diet and livelihood," *id.* at 665 n.6.[1] In 1854 and 1855, the United States negotiated a series of treaties with the Respondent Tribes, who insisted upon one permanent, overriding condition for their land cessions: that they maintain, on and off their reservations, the ancient fisheries that "were not much less necessary to

[1] Anadromous fish, including salmon and steelhead, "hatch in fresh water, migrate to the ocean where they . . . reach mature size, and eventually complete their life cycle by returning to the fresh-water place of their origin to spawn." *Fishing Vessel*, 443 U.S. at 662. *Fishing Vessel* was the last of seven decisions from this Court interpreting the Treaties at issue; it arose from the same litigation of which this case is a subproceeding. The detailed historical findings described and affirmed in *Fishing Vessel* significantly informed this Court's holdings. This Statement draws heavily from *Fishing Vessel*'s historical discussion, which likewise was relied upon (and supplemented) by the district court and the Court of Appeals here. The State introduced no historical evidence in this subproceeding.

the existence of the Indians than the atmosphere they breathed." *Id.* at 680 (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).

The American treaty commissioners, led by Territorial Governor Isaac Stevens, "recognized the vital importance of the fisheries to the Indians[.]" *Id.* at 666. They understood that securing those fisheries was critical to obtaining the Tribes' agreement, and would also allow the negotiators to satisfy their "very clear instructions" that the Tribes "not become a burden on the treasury." App. 268a. Accordingly, the Tribes "were invited by the white negotiators to rely and in fact did rely heavily on the good faith of the United States to protect [their fishing] right." *Fishing Vessel*, 443 U.S. at 667. Governor Stevens repeatedly assured the Tribes that they would remain able to sustain themselves through their fisheries, telling the Tribes that "[t]his paper secures your fish," *id.* at 667 n.11, and that they could rely on this essential sustenance "forever." App. 92a. As this Court concluded, "[the] Governor . . . and his associates were well aware of the 'sense' in which the Indians were likely to view [such] assurances. . . . [T]he vital importance of the fish to the Indians was repeatedly emphasized by both sides, and *the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent.*" *Fishing Vessel*, 443 U.S. at 676 (emphasis added); *see also* App. 91a; App. 128a-130a, FF1-2; App. 177a, CL17; App. 266a-268a.

The resulting Treaties contain virtually identical fishing clauses:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory[.]

Treaty of Medicine Creek art. III, Dec. 26, 1854, 10 Stat. 1132, 1133. In the ensuing decades, this promise was largely honored, and the "Indians continued to harvest most of the fish taken from the waters of Washington[.]" *Fishing Vessel*, 443 U.S. at 668.

By the end of the nineteenth century, however, the State began to "deliberately and systematically prevent[] the Tribes from engaging in the off-reservation fishing promised under the Treaties." App. 7a. The State waged a century-long campaign of oppressive and discriminatory regulation, mass arrests, and physical attacks to thwart the Tribes' exercise of their fishing rights. App. 69a-77a. The Tribes, with the assistance of the United States, fought to save their way of life. Repeated judicial intervention, necessitated by some of "the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century," and culminating in the decision in *Fishing Vessel*, 443 U.S. at 696 n.36, ensured that the rule of law prevailed and that the treaty promise was honored.[2]

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[2] The State resurrects the canard, often expressed during this period, that it was a "nonparty" to the Treaties. Pet. 1, 31. However, this Court has long held the State to be bound by them

The efforts of the Tribes and the United States to vindicate the Tribes' fishing rights have long extended to protecting the fisheries on which the rights depend, and it is those efforts – and the State's corresponding resistance – that occasioned the present dispute.

### B. Barrier Culverts and the Decline in Washington's Fisheries

Across Washington, scores of roads cross waterways that salmon and steelhead use to migrate to the ocean and to return to their spawning grounds. When road builders do not bridge a waterway, they construct culverts that allow the stream to flow under the road. App. 77a-78a; App. 136a, FF3.29. "Stream simulation" culverts allow for the passage of water and fish, App. 137a-138a, FF3.37-3.38, 3.41, whereas a "barrier culvert" inhibits or prevents fish passage, App. 77a. No dispute exists that it is generally feasible to build stream simulation culverts to allow fish to pass. App. 137a-139a, FF3.35-3.47.

Since Magna Carta, proscriptions against barriers to fish passage have been common in Anglo-American law. *See* Magna Carta of 1215, ch. 33 ("All kydells for the future shall be removed altogether from [the Rivers] Thames and Medway, and throughout all England,

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under the Supremacy Clause. *See, e.g., Tulee v. Washington*, 315 U.S. 681 (1942). Indeed, the Tribes' land cessions paved the way for Washington statehood. *Winans*, 198 U.S. at 384.

except upon the sea shore.").[3] The Oregon Territory Organic Act barred obstruction of salmon streams that did not provide for proper fish passage. Act of August 14, 1848, § 12, 9 Stat. 323, 328. Just shortly before the Treaties were negotiated and signed, that prohibition became the law of the Washington Territory (of which Isaac Stevens was Governor) when it was carved out from Oregon in 1853. Act of March 2, 1853, § 12, 10 Stat. 172, 177. Washington retains fish passage laws to this day, Wash. Rev. Code §§ 77.15.320, 77.57.030, and since at least 1950, Washington has recognized that those laws apply to state highway culverts. Fish Passage Facilities for Highway Culverts, Wash. Att'y Gen. Op. No. 304 (July 19, 1950). *See* App. 140a, FF3.50 (admitted fact).

Unfortunately, while state law has long required culverts to pass fish, the State has constructed and maintains hundreds of culverts that do not. The State claims, remarkably, that no evidence exists that these barrier culverts harm salmon populations. Pet. 30-31. But its assertions are flatly contradicted by the district court's detailed factual findings, which were affirmed by the Court of Appeals and rest in significant part on the State's own admissions, including reports published by state agencies and the testimony of agency scientists.

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[3] Reprinted in English translation at http://avalon.law.yale.edu/medieval/magframe.asp.

The district court's thorough findings document how barrier culverts destroy salmon populations:

> Culverts which block the upstream passage of adult salmon returning to spawn render large stretches of streambed useless for spawning habitat, and reduce the number of wild salmon produced in that stream. Culverts which block stream areas in which juvenile salmon rear may interfere with their feeding and escapement from predators. Culverts which block the passage of juvenile salmon downstream prevent these salmon from reaching the sea and attaining maturity.

App. 174a-175a, CL7 (summarizing findings); *see also, e.g.*, App. 160a-162a, FF20-23, 26.

With respect to state barrier culverts specifically, the district court quantified, based on the Washington Department of Fish and Wildlife's ("WDFW's") own records, their singular impact on salmon spawning and rearing habitat:

> *State-owned barrier culverts are so numerous and affect such a large area that they have a significant total impact on salmon production. . . .* As of the trial date in 2009, there were 1,114 state-owned culverts in the Case Area, including at least 886 that blocked "significant habitat". . . . WDFW records showed at that time that State-owned barrier culverts blocked salmon access to an estimated 1,000 miles of stream and nearly five

> million square meters of habitat. Admitted Facts 3.64-3.71.

App. 162a, FF27 (emphasis added); *see also* App. 95a (affirming same); App. 115a ("The record contains extensive evidence, much of it from the State itself, that the State's barrier culverts have [a substantial adverse effect on salmon]."); App. 156a-157a, FF4; App. 109a.

The district court further made findings regarding specific rivers where barrier culverts have destroyed or substantially interfered with salmon populations. App. 161a, FF24-25; *see also* App. 110a-111a. It found that "[c]yclical patterns in ocean conditions and other natural disturbances cannot account for *the persistent, long-term downward trend in Case Area salmon populations*." App. 158a, FF15 (emphasis added). And, again contrary to the State's claims, it found that "[c]orrection of fish passage barrier culverts is a cost-effective and scientifically sound method of salmon habitat restoration. It provides immediate benefit in terms of salmon production, as salmon rapidly re-colonize the upstream area and returning adults spawn there. Exhibit AT-004, p. 12." App. 166a-167a, FF38; *see also* App. 111a-114a. Indeed, as the district court noted, the State's own fisheries agency "*has recognized that culverts must be corrected in order to accomplish the State's salmon recovery efforts*[.]" App. 155a, FF3.131 (admitted fact) (emphasis added); *see also* App. 130a, FF3.1; App. 156a, FF3.132-3.134 (admitted facts).

In 1997, the state legislature created a Fish Passage Task Force, co-chaired by the WDFW and the Washington

State Department of Transportation ("WSDOT"), and including governmental and industry representatives. App. 147a, FF3.88. The Task Force reported "that fish passage barrier culverts are a 'key factor' in the wild salmon equation" and that "the creation of new barriers must be prevented and the rate of barrier correction must be accelerated if Washington wild salmon and trout stocks are to recover." App. 147a, FF3.89 (quoting Task Force Report) (internal quotation marks omitted). Thereafter, WDFW, State Parks, and the Washington Department of Natural Resources ("WDNR") took steps to remediate their barrier culverts. App. 148a, FF3.90; App. 166a, FF36-37. However, the vast majority of state barrier culverts are operated by WSDOT, whose remediation has been so slow that the district court found that even "assuming no new barrier culverts were to develop, it would take the State more than 100 years to replace the 'significantly blocking' WSDOT barrier culverts that existed in 2009." App. 163a, FF28.

But neither the fish nor the Tribes have a century to wait. "Salmon abundance has declined precipitously from treaty times, but particularly in the last few decades." App. 157a, FF7; *see also* App. 174a, CL6 ("Salmon stocks in [western Washington] have declined alarmingly[.]"); App. 85a. And "[t]he Tribes and their individual members have been harmed economically, socially, educationally, and culturally by the greatly reduced salmon harvests that have resulted from . . . State-maintained fish passage barriers." App. 176a, CL14; *see also* App. 85a (quoting App. 158a,

FF10); App. 157a-158a, FF9-13 (describing impacts on Tribes from decline in fisheries). Non-Indian fishermen have likewise suffered greatly from the deterioration of the fisheries, App. 157a, FF8; App. 167a, FF39; App. 175a, CL11, and have voiced strong support for the district court's injunction. Pacific Coast Fed'n of Fishermen's Ass'n Amicus Brief, 9th Cir. Dkt. 66-1, 66-2. As the head of the WDNR summarized in urging the Washington Attorney General not to file a Petition here, "Salmon runs continue to decline across the state. . . . Saving our salmon is not simply a tribal issue. It is a Washington issue[.]" Tribal Respondents App. 1a-2a.

## II. COURSE OF PROCEEDINGS

The United States and tribal plaintiffs filed *United States v. Washington* in 1970, challenging interference with tribal harvest through discriminatory state regulation and enforcement and fishery depletion through habitat alteration, including barrier culverts. *United States v. Washington*, 384 F. Supp. 312, 328 (W.D. Wash. 1974). The district court bifurcated the proceedings. In Phase I, it apportioned the harvest to allow sufficient fish for tribal needs and enjoined contrary state regulation. *Id.* at 342-44, 401-02, 414-19. It retained jurisdiction to resolve the Phase II habitat and hatchery fish issues and other fishing disputes that might arise. *Id.* at 333.

Following Ninth Circuit affirmance and subsequent proceedings engendered by state resistance to

the district court's decrees, this Court held that, in order to meet their moderate living needs, the Tribes have a right of up to half the harvest in their usual and accustomed fishing waters. *Fishing Vessel*, 443 U.S. at 686-87. The Court deemed hatchery fish issues broached by the parties as beyond the scope of its review, as the district court had not yet ruled in Phase II. *Id.* at 688 n.30.

The district court subsequently issued a broad declaration, applicable to all state activities and without reference to a particular dispute, that the State had a duty "to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs." *United States v. Washington*, 506 F. Supp. 187, 208 (W.D. Wash. 1980). On rehearing en banc, the Ninth Circuit, with then-Judge Kennedy on the panel, emphasized that "[t]he State of Washington is bound by the [Treaties]," *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (per curiam), but vacated the district court's declaration as contrary to sound judicial discretion. "[T]he measure of the State's obligation will depend for its precise legal formulation on all of the facts presented by a particular dispute." *Id.*

In 2001, following the State's failure to take meaningful action regarding WSDOT barrier culverts following the 1997 Task Force Report, *supra* at 9-10, the Tribes initiated this sub-proceeding under the district court's continuing jurisdiction. The United States joined, seeking the same relief. On cross-motions for summary judgment, the district court declared that

the State's barrier culverts violated the Treaties. App. 271a. The court then held a trial to determine the propriety and scope of injunctive relief. App. 84a. The State declined the district court's invitation to propose injunction terms, stating only that it had not violated the Treaties and hence that no injunction should issue. App. 107a.

The district court's final opinion included extensive findings of fact and conclusions of law. App. 128a-179a. It held that the State had violated a "narrow and specific treaty-based duty," App. 178a, CL19, "to refrain from building or operating culverts . . . that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest." App. 271a; App. 174a, CL4.

The district court made numerous detailed findings, discussed above, regarding the harm to the fisheries from state-owned barrier culverts; the resulting injury to the Tribes' economy and culture; and the concomitant injury to the State's non-Indian commercial and sports fishermen. *Supra* at 8-11. It found that the costs of fixing WSDOT culverts were far less than the State was predicting and that the State's culverts would need to be replaced at the end of their useful life in any event, or in connection with highway projects. App. 170a, FF48. Even the State's inflated claims of $117 million in annual costs, App. 118a, would easily fall within the Department of Transportation's budget (which was $7.88 billion for the 2011-2013 biennium), and such spending would have no effect on other state programs because of the segregation of the

transportation budget. App. 171a-173a, FF54-60; App. 177a-178a, CL17.

The district court also found that at its current rate of culvert remediation, the WSDOT would not finish the job for more than a century, if ever. App. 162a-164a, FF28-31. It concluded that "[t]he balance of hardships tips steeply toward the Tribes in this matter," App. 177a, CL16, and that the public interest favors an injunction because the Tribes, non-Indian fishermen, and Washington's iconic fisheries and related economic activity will all benefit, App. 178a, CL18.

The district court carefully tailored the injunction to remedy the barrier culverts while minimizing the burden on the State. The court's injunction "divide[s] WSDOT barrier culverts into two categories. High priority category culverts [those blocking more than 200 meters of habitat] must be remediated within seventeen years. Low priority category culverts must be remediated only at the end of the natural life of the existing culvert, or in connection with a highway project that would otherwise require replacement of the culvert." App. 14a. In addition, high priority "culverts blocking a total of ten percent of the accessible upstream habitat above all the high priority culverts [] can be remediated on the schedule of low priority culverts." App. 14a-16a; *see also* App. 237a-238a, §§ 6-8. By the State's own calculations, approximately 230 high-priority state culverts can be deferred under this latter provision. App. 15a-16a; App. 119a; App. 238a, § 8. The injunction also requires the State's natural

resource agencies to correct their barrier culverts by 2016, as already required by state law and policy. App. 237a, § 5.

The State did not seek a stay of the injunction. The natural resource agencies largely completed their corrections by the 2016 deadline.[4]

The State appealed. In a thorough opinion, the Ninth Circuit affirmed the district court's extensive findings of fact and its determination that the State has acted in violation of the Treaties by maintaining barrier culverts, as well as the propriety and scope of its injunction. App. 58a-126a, 1a-17a. The Circuit denied rehearing en banc, over a dissent authored by Judge O'Scannlain. App. 17a-42a. This Petition followed.

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[4] https://data.results.wa.gov/reports/G3-2-2-c_Fish-Passage-Barriers.

## REASONS FOR DENYING THE PETITION

### I. THE COURTS BELOW CREATED NO CONFLICT, BUT INSTEAD HEWED CLOSELY TO THE TREATY LANGUAGE AND THIS COURT'S PRECEDENTS, IN HOLDING THAT WASHINGTON DOES NOT HAVE LICENSE TO DESTROY THE TREATY FISHERIES.

#### A. The Court of Appeals' Interpretation of the Stevens Treaties Creates No Conflict in Lower Court Authority.

Washington argues that, despite securing to the Tribes the right of taking fish, the Stevens Treaties place no restriction on the State's ability to extirpate the fish runs that form the subject matter of the treaty right. "The State contended, and continues to contend, that it can block every salmon-bearing stream into Puget Sound without violating the Treaties." App. 8a; *see also* App. 87a-88a (quoting oral argument); App. 83a (quoting State's Answer). That cannot be correct, as it would nullify the Tribes' carefully negotiated fishing rights. The Court of Appeals recognized this and rejected the State's novel position. It did so cautiously, "hold[ing] only that the State violated the Treaties when it acted affirmatively to build roads across salmon bearing streams, with culverts that allowed passage of water but not passage of salmon." App. 10a-11a; *see also* App. 96a; App. 84a. No court of appeals or state supreme court takes the contrary view – namely, that a State can freely destroy treaty-reserved fisheries despite the absence of treaty language giving it that authority. As the State does not contest, the decision

below accordingly creates no conflict in lower court authority.

### B. The Court of Appeals' Decision Does Not Conflict with *Fishing Vessel*.

The State's principal argument for certiorari is that the decision below "interprets a federal treaty in a way that rejects this Court's prior reading of the exact same language in this very case." Pet. 18. But the conflict alleged with *Fishing Vessel* is illusory. *Fishing Vessel* addressed the allocation of the fisheries, and held that "an equitable measure of the common right should initially divide the harvestable portion of each run that passes through a 'usual and accustomed' place into approximately equal treaty and nontreaty shares, and should then reduce the treaty share if tribal [moderate living] needs may be satisfied by a lesser amount." 443 U.S. at 685. *Fishing Vessel* so held because the Treaties secure the Tribes' right to take fish "in common with all citizens," *id.* at 674, and "[s]ince the days of Solomon, [an equal] division has been accepted as a fair apportionment of a common asset," *id.* at 686 n.27.

The Court of Appeals, by contrast, addressed whether the Treaties place any limits on the State's ability to destroy the fisheries that form the Treaty *res*, and held that they do. There is no inconsistency between these two holdings.

First, the procedural history of this case precludes the State's assertion of a conflict. As discussed above,

Judge Boldt bifurcated the proceedings in *United States v. Washington*, with Phase I focused on the tribal share of the fisheries and Phase II on issues relating to the overall number of fish, including in-stream barriers. *Supra* at 11; App. 78a. *Fishing Vessel* arose from the lower court proceedings in Phase I, *see* 443 U.S. at 674, and the Court recognized that Phase II issues were not "fairly subsumed within [the] grant of certiorari." *Id.* at 688 n.30. The State thus claims a conflict with *Fishing Vessel* on an issue not before the *Fishing Vessel* Court.

Second, the State's asserted conflict depends on a patent distortion of the decision below. The Court of Appeals addressed a question left open in *Fishing Vessel*, namely whether the Treaties place any limits on the State's ability to destroy the treaty fisheries. In answering that question, the Court of Appeals' decision was narrow. Thus, the court did *not* hold that the Tribes are entitled to enough salmon to provide a moderate living irrespective of the obligation to share harvest, App. 78a-79a, and despite variations in circumstances. *See* App. 10a-11a ("We do not hold that the Treaties' promise of a moderate living is valid against acts of God. . . . Nor do we hold that the promise is valid against all human-caused diminutions, or even against all State-caused diminutions."). It held "only that the State violated the Treaties when it acted affirmatively to build . . . culverts that allowed passage of water but not passage of salmon." *Id.*; *see also* App. 128a (district court holding).

There simply is no contradiction between this holding and *Fishing Vessel*'s allocation determination. That the "in common with" language limits the tribal share does not suggest the State may reach in and destroy the fish subject to that share. Indeed, only two Terms earlier, this Court had held that the Treaties do not allow one party to frustrate the rights of others through destruction of the fisheries. *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 176 (1977) (Puyallup Tribe could not "interdict completely the migrating fish" passing through its reservation as that would impair the rights of non-Indian fishers). Only by ignoring the textual, "in common with" basis for the equitable allocation of the fisheries can the State argue that this Court explicitly considered an issue not before it and rejected all limits on the State's ability to eviscerate the Tribes' share.

Third, the State errs in seeing a conflict in the Court of Appeals' characterization of the purpose of the treaty promise as being "that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." App. 94a (citing *Fishing Vessel*, 443 U.S. at 686). Indeed, this language from the decision below should surely sound familiar, as it tracks this Court's statement in *Fishing Vessel* nearly verbatim:

> As in *Arizona v. California* and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians

> with a livelihood – that is to say, a moderate living.

443 U.S. at 686. Far from "reject[ing] this Court's prior reading of the . . . [treaty] language," Pet. 18, then, the Court of Appeals described the fishing right in virtually identical terms.

Indeed, the Court of Appeals relied on the moderate living standard much as this Court did in *Fishing Vessel*. Just as this Court used the standard to bound the tribal share, the Court of Appeals used it to bound the State's obligation to maintain culverts for fish passage – while recognizing that the Tribes cannot exceed their share "even if the supply of salmon is insufficient to provide a moderate living." App. 10a. That is not conflict, but agreement.

Fourth, the factual conclusions in *Fishing Vessel* confirm the absence of a conflict. As discussed above, this Court detailed three sets of factual findings concerning the treaty negotiations and historical context that substantially informed its holding. *Supra* at 4. Thus, it described: (1) the tremendous significance of the anadromous fisheries to the Washington Tribes, and their insistence on retaining those fisheries in order to survive; (2) the United States' recognition of that dependence and its determination, motivated by concern for the Tribes and by self-interest, that the fisheries be protected; and (3) the resulting assurances, "crucial in obtaining the Indians' assent," that "the treaties would protect [their] source of food and commerce," 443 U.S. at 676.

The Court of Appeals and the district court relied heavily on these same findings, and on additional uncontroverted historical evidence, in concluding that the treaty negotiators would not have understood the State to possess the right to block fish passage and thereby to destroy the fisheries the United States had promised to protect. App. 7a; App. 79a; App. 84a; App. 129a-130a; App. 263a-266a. Far from conflicting with *Fishing Vessel*, then, the decisions below fully comport with the conclusions that this Court drew from the historical record.[5]

In sum, the State's principal argument, that of a purported conflict with *Fishing Vessel*, provides no basis for the writ to issue.

### C. The Court of Appeals' Decision Conflicts with No Other Decision of This Court.

The State argues that the Court of Appeals' decision also "conflicts with this Court's holdings about treaty interpretation." Pet. 22. That is flatly incorrect.

The State first asserts that the decision contravenes the statement in *Choctaw Nation of Indians v.*

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[5] The State additionally argues that the "moderate living" standard is "unworkable." Pet. 21. In other words, it argues that the Court of Appeals' reliance on a standard ratified in *Fishing Vessel* creates a conflict with *Fishing Vessel* – which underscores the flimsiness of the asserted conflict. The argument also smacks of hypocrisy. The State has not hesitated to rely on the moderate living standard in arguing that the tribal share of various fisheries should be capped. *See, e.g.*, *United States v. Washington*, 157 F.3d 630, 651-52 (9th Cir. 1998).

*United States*, 318 U.S. 423, 432 (1943), that Indian treaties "cannot be rewritten or expanded beyond their clear terms," because the Court of Appeals purportedly ignored the treaty provision by which the Tribes ceded land. But no matter how strenuously the State and its amici claim that the "import" of the Court of Appeals' holding is "that the Tribes silently retained a right to control land use decisions," Pet. 23, the court held only that the State cannot maintain culverts that block fish passage, a decision that has no implications for land use.

In addition, for over a century this Court has held that the cession language is qualified by the treaty fishing clause, which reserves to the Tribes various pre-existing rights in the ceded territory. *Winans*, 198 U.S. at 381. The State nowhere explains how its assertion of unlimited authority to block 1,000 miles of streams and destroy the fish runs in them squares with the Treaties' express promise that "[t]he right of taking fish, at all usual and accustomed grounds and stations, *is further secured to said Indians*[.]" Treaty of Medicine Creek art. 3, 10 Stat. at 1133 (emphasis added). Under the State's theory, the Tribes would enjoy no security at all in their fishing right – it would exist entirely at the mercy of the State, which could unilaterally destroy that which the Tribes insisted upon as a prerequisite to their land cession.

The State next questions the lower courts' reliance on statements of Governor Stevens and his fellow negotiators at the treaty councils to interpret the text of the Treaties that they drafted. Pet. 23-24. But seven

decisions of this Court have construed the language of the Treaties in light of that negotiating record. And while the State reads *Fishing Vessel* differently than did the courts below, *Fishing Vessel* unquestionably looked to the statements of the treaty negotiators in construing the treaty language, which has been a hallmark of this Court's approach to treaty interpretation. "*This review of the history and the negotiations of the agreements is central to the interpretation of treaties.*" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (emphasis added); *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978) (treaty language is to be "read in light of the common notions of the day and the assumptions of those who drafted [it]"); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991) (applying same principles to construction of non-Indian treaty).

### D. No Occasion Exists for Revisiting the Careful, Factbound Examination of the Historical Record Conducted by the Courts Below.

The State – which did not put on or controvert any historical evidence in this subproceeding – makes a faint attempt to question the district court's detailed historical findings by asserting that the parties' "practical" construction suggests the State is free to destroy treaty fisheries. Pet. 24. The State wisely does not belabor this argument, which would require this Court to revisit the lower courts' careful findings of historical

fact – findings fully consistent with those affirmed in *Fishing Vessel*.

Even if factbound error correction were the stuff of certiorari, the State makes no claim of error. As noted, the treaty language, negotiating history, and subsequent history of tribal harvests belie a State right to destroy the fisheries. That the "Tribes agreed in the treaties that roads could be built," Pet. 24, does not suggest that they and the United States agreed to fish barriers under those roads, *particularly when contemporaneous territorial law proscribed exactly that*. *Supra* at 7. The culvert and dam building cited by the State occurred decades after the Treaties, and nothing in the record indicates that the federal or state governments considered the Treaties as they undertook those activities.

### E. The State's Attack on the Court of Appeals' Alternate Holding Suggests No Basis for this Court's Review.

The Court of Appeals held that "[e]ven if Governor Stevens had not explicitly promised that 'this paper secures your fish,' and that there would be food 'forever,' [it] would infer such a promise." App. 92a. This holding follows directly from this Court's seminal holding in *Winters v. United States*, 207 U.S. 564 (1908), that an explicit reservation of tribal rights in land implies the reservation of water rights necessary to their use. "Just as the land on the Belknap Reservation [in *Winters*] would have been worthless without water to

irrigate the arid land, . . . the Tribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish." App. 94a.

The State's attack on this holding provides no basis for review. First, the holding was in the alternative, and revisiting it would not affect the outcome below.

Second, the attack questions the factbound application of settled law. This Court enunciated the *Winters* doctrine over a century ago, and has reaffirmed it repeatedly. *See, e.g.*, *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Arizona v. California*, 373 U.S. 546, 599-600 (1963). The relevance of the doctrine to fishing rights under the Stevens Treaties was cemented in *Fishing Vessel*, which relied on *Arizona v. California* (a *Winters* case) for the "central principle" that the Treaties reserve fisheries to the tribes sufficient for a moderate living. 443 U.S. at 686.

Third, the State's claim of error is meritless. The State asserts that inferring a treaty right to fish passage through its culverts is unnecessary because both it and the federal government have the authority and "incentives to preserve salmon runs." Pet. 25. This, of course, has no bearing on the promises made in the text of the Treaties as explained by Governor Stevens in 1855. And the unchallenged and largely stipulated findings, as detailed above, are that there has been a precipitous decline in salmon stocks, resulting in great harm to the Tribes, and caused in no small part by the State's barrier culverts. App. 85a (quoting App. 158a, FF10; App. 174a, CL6-7). Washington's Attorney

General may be comfortable engaging in platitudes about state protection of the treaty fisheries, but the courts below were correct to respect history, the record, and the views of the State's natural resource agencies instead. App. 69a-77a.

## II. THE COURTS BELOW CREATED NO CONFLICT IN REJECTING THE STATE'S EQUITABLE DEFENSE OF WAIVER.

The State challenges the rejection of its claim that the United States waived the Tribes' treaty rights by permitting or reviewing the design of some state culverts. Pet. 27. The Court of Appeals grounded this rejection in the principle that the United States "may abrogate a treaty with an Indian tribe only by an Act of Congress that 'clearly express[es an] intent to do so.'" App. 97a (brackets in original) (quoting *Mille Lacs*, 526 U.S. at 202). This is black-letter law, as this Court has long held that, because "Indian treaty rights are too fundamental to be easily cast aside," *United States v. Dion*, 476 U.S. 734, 739 (1986), "Congress' intention to abrogate Indian treaty rights [must] be clear and plain," *id.* at 738; *see also Mille Lacs*, 526 U.S. at 202-03; *Fishing Vessel*, 443 U.S. at 690.

The State does not and cannot argue abrogation by Congress because there has been none. It claims instead that employees of the Federal Highway Administration – with no responsibility for, apparent knowledge of, or attention to tribal issues – waived the Tribes' rights through their review of state culvert designs

before approving federal highway grants. Pet. 27. But no court has ever accorded to federal bureaucrats the awesome power to destroy treaty rights. Far from creating a conflict, the Court of Appeals' decision avoided one.

The State asserts that the fundamental principle that only Congress can waive and thereby abrogate treaty rights was overruled *sub silentio* by *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), and has been disregarded by three later Second Circuit decisions. Pet. 25-27. But far from "brush[ing] aside *Sherrill*," *id.* at 26, the Court of Appeals analyzed it closely and properly determined that it does not apply here. App. 98a-99a; App. 12a. The United States was not a party to *Sherrill*. The equitable defenses that this Court upheld there were grounded in the passage of time: in particular, in the passage of two hundred years since the Oneida Nation sold its land, the settlement of that land by non-Indians, and the disruptive potential inherent in the Nation's reassertion of territorial jurisdiction after so many years. In sum, "the distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate." *Sherrill*, 544 U.S. at 221; *see also id.* at 218-19. There is nothing like that here.

The Second Circuit has extended *Sherrill* to land claims involving the United States. *Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163 (2d Cir. 2014); *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005). However, like the Court of Appeals, it has recognized that the *Sherrill* defenses remain grounded in the passage of time and inaction by tribes (and not just the United States). "In the wake of this trilogy – *Sherrill*, *Cayuga*, and *Oneida* – it is now well-established that Indian land claims asserted generations after an alleged dispossession are inherently disruptive . . . and are subject to dismissal on the basis of laches, acquiescence, and impossibility." *Stockbridge-Munsee*, 756 F.3d at 165; *see also Oneida*, 617 F.3d at 127.

The contrast between this case and *Sherrill* and its Second Circuit progeny is stark. There has been no abandonment of rights. The Tribes (and the United States) have fought for over a century to preserve the Tribes' treaty fishing rights, enduring oppressive state efforts that culminated in the "employ[ment of] surveillance planes, high powered boats, tear gas, billy clubs and guns against tribal members engaged in off-reservation fishing," App. 7a, coupled with "extraordinary machinations" by state courts and agencies in resisting federal court decrees protecting the Tribes' rights, *Fishing Vessel*, 443 U.S. at 696 n.36. And the Tribes' response has long included efforts to address state-owned barrier culverts. The Tribes and the United States pled claims respecting culverts at the

outset of *United States v. Washington*, and "[f]or many years, the Tribes had complained that the State had . . . built culverts under the roads that allowed passage of water but not passage of salmon." App. 8a. The Tribes' claims thus upset no "justifiable expectations," given their consistent assertion and the ancient provenance of Washington's ongoing fish passage obligations. The State accordingly did not argue to the Court of Appeals, and does not argue here, that the passage of time may bar the Tribes' claims. *Cf.* App. 17a-18a (time bar suggestion made in dissent from denial of rehearing en banc); *see also* App. 20a; App. 32a.

Because no plausible claim can be made that the Tribes seek to revive long-abandoned rights, there is no conflict with *Sherrill* and the Second Circuit's decisions. Indeed, under black-letter law regarding abrogation of tribal treaty rights, the State's waiver argument, not the Court of Appeals' rejection of it, is the outlier.

## III. THE STATE'S RECORD-BOUND ATTACKS ON THE DISTRICT COURT'S INJUNCTION REST ON PREMISES THOROUGHLY DISCREDITED BELOW.

The State, which refused to participate in the shaping of the district court's injunction, now spills a great deal of ink attacking it. But its attacks implicate no unsettled questions of law. They are record-bound, and rely on assertions debunked below and contradicted by the state agencies possessing relevant

subject-matter expertise. After a detailed review of the injunction and underlying findings, the Court of Appeals concluded that "Washington misrepresents the evidence and mischaracterizes the district court's order." App. 108a. The same is true here, and the factual disputes presented by the State provide no basis for further review. Sup. Ct. R. 10; *Glossip v. Gross*, 135 S. Ct. 2726, 2740 (2015) ("Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not lightly overturn the concurrent findings of the two lower courts.") (internal quotation marks and citation omitted); *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error") (internal quotation marks and citations omitted).

The State makes three arguments. First, it claims that "'[t]he injunction requires [it] to replace or repair all 817 culverts located in the [case] area . . . without regard to whether replacement of a particular culvert actually will increase the available salmon habitat'" because of other in-stream barriers. Pet. 29 (quoting App. 37a). That attack distorts the injunction beyond recognition. As explained above, *supra* at 14, the injunction divides WSDOT barrier culverts into high- and low-priority categories and imposes a correction deadline only for the former. All low-priority culverts, and up to 230 high-priority culverts designated by the State, must be remediated only when the State would do so anyway – at the end of the culvert's natural life,

or during a highway project that would otherwise require its replacement. App. 114a-116a.[6] Far from crafting an inflexible injunction, then, the district court accorded the State considerable discretion in choosing which culverts to remediate.

Second, the State claims that the injunction requires fish passage through culverts "without any evidence" that this will enhance salmon populations. Pet. 30. As detailed above, this claim is flatly contradicted by the district court's detailed findings, affirmed by the Court of Appeals, and by the State's own agencies with subject-matter expertise, on whose reports the district court's determinations largely hinged. *Supra* at 7-10. The State cannot simply wish away these findings and the record evidence on which they are based. Nor do annual fluctuations in the runs, despite stable culvert numbers, Pet. 30-31, prove that culverts are harmless – they merely show that natural variation is also at work.

The State criticizes only the Court of Appeals' citation to one particular piece of record evidence, the 1997 Task Force Report. Even if the criticism was warranted, it would say nothing about the numerous other documents relied upon by the district court, and it would hardly justify the writ. And while the State claims that "the district court – the factfinder –

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[6] The rehearing dissent misunderstands this point. The injunction does not simply provide the State "a longer schedule for replacing barriers that will open up less habitat." App. 40a. It allows the State to wait until the barriers would otherwise need replacement.

rejected the use of that report to predict 'lost' salmon as unreliable and never cited it in its findings of fact," Pet. 31, this is simply not true. *See* App. 147a, FF3.89.

In the wake of the report, state agencies other than WSDOT have acted to remediate their barrier culverts. *Id.*; *see also* App. 148a, FF3.90; App. 164a-166a. Those agencies have recognized that the exclusion of fish from 1,000 miles of spawning and rearing grounds has significantly harmed their populations. The district court did not err in so finding based on the overwhelming and largely stipulated evidence before it, and the Court of Appeals created no occasion for certiorari in affirming that conclusion.

Third, and finally, the State claims that the injunction works a "stark inequity" in requiring the State to pay the full cost of replacing culverts whose construction was partly supported with Federal Highway Administration grants, Pet. 31, and more generally that the district court failed "to consider the equities in fashioning relief," Pet. 32. As to the first point, the Court of Appeals aptly concluded that the district court was right to require the State to remedy its own violations of the Treaties, rather than continuing to hide behind purported authorizations from federal officials. "It was not an abuse of discretion to require the State to pay for correction of its own barrier culverts." App. 120a.

As to the broader point, the State again misstates the record. The district court carefully weighed the equities in fashioning its relief – it just did so in a way

that the State does not like. The court concluded that "[t]he balance of hardships tips steeply toward the Tribes in this matter." App. 177a, CL16; *see also* App. 120a-121a (affirming district court's conclusions). It relied on its findings, consistent with those affirmed in *Fishing Vessel*, that the promise of a sustained fishery "was crucial in obtaining [the Tribes'] assent to the Treaties' provisions," and reasoned that "[e]quity favors . . . keep[ing] the promises upon which the Tribes relied when they ceded huge tracts of land[.]" App. 177a, CL16.

As noted, the district court further found that the Tribes have suffered grave economic and cultural injury from the infringement of their treaty rights. App. 176a, CL14. By contrast, "[t]he State has the financial ability to accelerate the pace of barrier correction." App. 177a-178a, CL17. The court rejected the State's cost estimates for culvert removal as unsupported by, and significantly in excess of, the historical costs in the record, App. 170a, FF48, and concluded that the relevant cost is the marginal cost of more timely correction. App. 177a-178a, CL17. It further found that even the State's inflated cost claims would easily fit within WSDOT's budget, which exists separate from the State's general fund. *Supra* at 13-14; *see also* App. 171a, FF54; App. 172a-173a, FF57-60; App. 177a-178a, CL17. The Court of Appeals affirmed each of these findings after detailed examination, *see* App.

118a-120a, App. 122a-123a (quoting App. 172a, FF56), and the State does not challenge them here.[7]

> Finally, the court found:
>
> > The public interest will not be disserved by an injunction. To the contrary, it is in the public's interest, as well as the Tribes' to accelerate the pace of barrier correction. All fishermen, not just Tribal fishermen, will benefit from the increased production of salmon. Commercial fishermen will benefit economically, but recreational fishermen will benefit as well. The general public will benefit from the enhancement of the resource and the increased economic return from fishing in the State of Washington.

App. 178a, CL18. This finding is echoed in the strong support of non-Indian fishers for the Tribes' position in this litigation, 9th Cir. Dkt. 66-1 at 6-14, 17-20, and by the urging of the State's Commissioner of Public Lands, the statewide elected official who leads the WDNR, that the State's Attorney General not file a Petition for Certiorari but instead work with the Tribes to restore Washington's salmon fisheries. Tribal Respondents App. 1a.

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[7] Given the dismantling of its cost assertions by the courts below, the State does not directly argue cost as a basis for overturning the injunction. However, the State and its amici at various junctures reiterate, without substantiation, that the injunction will cost "billions [of] dollars." Pet. ii (Question Presented 3); Pet. 3. The State should not present as fact assertions roundly rejected by the courts below. Sup. Ct. R. 15(2).

Aside from its finger-pointing at federal officials, the only equities the State suggests the district court to have overlooked are the State's voluntary efforts to remediate culverts and restore salmon populations. Pet. 32. But far from ignoring or punishing these "good deed[s]," *id.*, the district court expressly considered them, finding that at the State's recent correction rate, and "assuming no new barrier culverts were to develop, it would take the State more than 100 years to replace the 'significantly blocking' WSDOT barrier culverts that existed in 2009," App. 163a, FF28. Indeed, because of the continued deterioration of culverts, the court found there had been an "increase in the total number of WSDOT barrier culverts" from 2009 to 2012, App. 164a, FF29, "*lead[ing] to the untenable conclusion that under the current State approach, the problem of WSDOT barrier culverts in the Case Area will never be solved.*" App. 164a, FF31 (emphasis added). In light of these uncontested findings, and the likewise undisputed fact that various "stocks of native salmon have become so depleted that the species is listed as threatened or endangered," App. 175a, CL8, the district court properly concluded that an injunction is necessary. App. 179a, CL20. Indeed, it is fair to say that any decision that would instead leave in place the State's patently inadequate approach to culverts remediation would threaten to render the Tribes' treaty rights, and the salmon on which they depend, little more than a distant memory.

The district court's fact-intensive analysis of the equities hardly constitutes an abuse of discretion, let alone one warranting issuance of the writ.

## IV. THE STATE'S ATTEMPT TO SOW FEARS ABOUT FUTURE DECISIONS DOES NOT TRANSFORM THE NARROW HOLDING BELOW INTO ONE DESERVING OF REVIEW BY THIS COURT.

The State and its amici argue that the decision below is exceptionally important – not because of what it says, but because of what it does not. Cherry-picking the statements of a few commentators, and echoing the rehearing dissent, the State claims that "[t]he panel opinion fails to articulate a limiting legal principle that will prevent its holding from being used to attack a variety of development, construction, and farming practices, not just in Washington but throughout the Pacific Northwest." Pet. 33 (quoting App. 19a). But the Court of Appeals could not have been clearer about the narrow scope of its decision: "We hold only that the State violated the Treaties when it acted affirmatively to build roads across salmon bearing streams, with culverts that allowed passage of water but not passage of salmon." App. 10a-11a; *see also* App. 178a, CL19 (district court) ("The State's duty to maintain, repair or replace culverts which block passage of anadromous fish does not arise from a broad environmental servitude. . . . Instead, it is a narrow and specific treaty-based duty that attaches when the State elects to block

rather than bridge a salmon-bearing stream with a roadbed.").

The State faults the Court of Appeals for not specifying other state actions that might or might not violate the Stevens Treaties. This is remarkable. As noted, the Phase II district court announced a broad definition of the State's environmental responsibilities under the Treaties, applicable to all state activities. The State appealed, arguing that this was tantamount to an environmental servitude. While underscoring that the State is bound by the Treaties, an en banc panel of the Ninth Circuit, including then-Judge Kennedy, agreed that the district court had swept too far, and held that the precise measure of the State's duties should be delineated in litigation over particular state actions. *Supra* at 12.

That is exactly what happened here. The Tribes brought a clear set of facts to court on a narrow issue involving one specific state practice – maintaining culverts in streams that directly impede salmon passage and break their anadromous life cycle. The courts below found that one practice to violate the State's duties under the Treaties, and their carefully circumscribed remedy focused entirely on it.

This was an appropriate, conservative exercise of the judicial function. The Court of Appeals, as it properly recognized, was not sitting as a super-legislature with the authority to address all manner of situations other than the one before it:

> Cabining our opinion by means other than a careful, detailed description of the facts presented would have entailed positing hypothetical facts in cases not before us and giving an improper advisory opinion. . . . Other cases with different facts might come out differently, but we did not decide – and should not have decided – such cases.

App. 12a. The Court of Appeals, in other words, did not "[f]ashion[] itself as a twenty-first century environmental regulator," App. 17a, but rather as a court, resolving a specific dispute based on facts adduced by the parties.

The dispute here was over the blocking of streams and the pace of culvert corrections. It was not a dispute over other activities that may not affect fish to the same extent, or in the same direct and indisputable way; that may not be as inconsistent with treaty-time understandings, or remedied as easily with so little effect on modern life; or that may never come before the courts. It was resolved by reading the Treaty text in the manner required by seven prior decisions of this Court, and in conjunction with extensive and well-documented historical, technical, and biological findings of fact, many of them coming from the State itself. The result conflicts with no appellate precedent and raises no issue of such prevalence and importance as to warrant this Court's review.

## CONCLUSION

The petition should be denied.

Respectfully submitted this 27th day of November, 2017.

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